STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of D.J. DESJARDINS, Minor.

UNPUBLISHED
January 7, 2014

No. 315048
Ingham Circuit Court
Family Division
LC No. 11-000346-NA

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to D.J. pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), MCL 712A.19b(3)(g) (failure to provide proper care and custody), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). We affirm the portion of the circuit court's order finding a statutory basis for termination, but vacate the court's best-interest analysis and remand for further consideration of that issue.

I. HEARSAY

Respondent first argues that the trial court erred by allowing petitioner to introduce hearsay testimony at the termination hearing. Respondent has two arguments in support of his position. First, he asserts that the Sixth Amendment right to confrontation was violated because he could not cross-examine the individuals making the statements. His argument is without merit because the Sixth Amendment right to confrontation applies in "all *criminal* prosecutions," US Const, Am VI (emphasis added), and it does not apply in child protective proceedings. *In re Brock*, 442 Mich at 101, 108; 499 NW2d 752 (1993).

Respondent's second argument is that because he was a non-adjudicated parent, the trial court had to find by clear and convincing *legally admissible evidence* that the grounds for termination existed, and that, by admitting and relying on inadmissible hearsay, the trial court erred.

> Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional. The adjudicative phase determines whether the probate court may exercise jurisdiction over the child. If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child [*Id.*]

"Unlike the adjudicative hearing, at the initial dispositional hearing the respondent is not entitled to a jury determination of the facts and, generally, the Michigan Rules of Evidence do not apply, so all relevant and material evidence is admissible." *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006); see also MCR 3.973(E). Thus, normally inadmissible evidence such as hearsay is admissible. See *In re Hinson*, 135 Mich App 472, 475; 354 NW2d 794 (1984).

A trial court's jurisdiction in a child protective proceeding "is tied to the children." *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002). Accordingly, the petitioner is not required to establish a statutory ground for jurisdiction with respect to every parent before it can act in its dispositional capacity. *Id*. With respect to the parent subject to the adjudication, his or her rights can be terminated on the basis of all relevant and material evidence, even if that evidence is not legally admissible. See, e.g., MCR 3.977(H)(2). However, if a basis for termination of parental rights is asserted that was not the subject of proofs during the jurisdictional trial, a foundation of legally admissible proofs must be presented. MCR 3.977(F)(1)(b); *In re DMK*, 289 Mich App 246, 258; 796 NW2d 129 (2010); *In re CR*, 250 Mich App at 201. Moreover, when the court takes jurisdiction over the children based on the plea of a single parent, the rules of evidence apply in the event that petitioner seeks to terminate the other parent's parental rights. *In re CR*, 250 Mich App at 205-206 ("the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication"). Here, it was DJ's mother who pleaded to jurisdiction. Therefore, petitioner was required to prove its case against respondent with legally admissible evidence.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Respondent correctly argues that the statements in the police reports were hearsay statements for which there is no established exception. However, the substance of the reports was also the substance of trial testimony by D.J.'s mother, who corroborated the relevant details in the police reports and whose testimony was subject to cross-examination. Child protective proceedings are subject to the harmless error rule in MCR 2.613(A). See MCR 3.902(A); see also *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253 (2008). MCR 2.613(A) provides that an "error in the admission . . . of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Accordingly, just because there is hearsay at a termination hearing does not mean that the trial court's decision must be reversed. *In re CR*, 250 Mich App at 207. Considering that the hearsay testimony was corroborated by legally admissible evidence and considering that the trial court expressly stated that petitioner met its burden by "clear and convincing *legally admissible evidence*" it is apparent that the mere existence of potentially inadmissible hearsay evidence did not affect the outcome of the trial. Under these circumstances, we find that it is not inconsistent with substantial justice to refuse to grant relief.

II. GROUNDS FOR TERMINATION

Respondent next argues that the trial court erred in finding clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j).

This Court reviews for clear error a trial court's finding that a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id*. at 296-297.

MCL 712A.19b(3)(c)(*i*) provides that the trial court may terminate a parent's rights if

> [t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds that
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> * * *
>
> [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

One of the conditions leading to adjudication, in April 2011, was the domestic violence between respondent and D.J.'s mother. Dr. Shannon Lowder noted in her psychological evaluation of respondent that he had minimized the domestic violence between him and D.J.'s mother. There was also testimony from Dr. Kathleen Jager that respondent called D.J.'s mother a "whore" and that after their couples therapy they would have arguments that would escalate. Evidently, Dr. Jager discontinued the couples therapy because she felt the two needed additional individual counseling first.

D.J.'s mother testified that she had an on-again/off-again relationship with respondent. She said that her arguments with respondent got physical "like once or twice, a couple times, not very many." She also testified that in March 2012 there was a domestic-violence argument that resulted in the police being called. She explained that respondent would not leave her house, pulled her hair, flipped over a chair she was sitting in, and choked her for four minutes on the floor. She also testified that respondent came over uninvited on June 21, 2012, and tried to break into her house by kicking the door. She said that he kicked out the air conditioner in the window. According to D.J.'s mother, respondent injured one of her guests by almost cutting off his finger and slashing his back and side.

D.J. was well over two years old at the time of the termination hearing and, according to testimony, had been in foster care since he was approximately nine months old. During that time, respondent had taken parenting classes and anger-management classes, received individual and couples therapy, received a psychological evaluation, and received drug screenings. Also, either he was not allowed to contact D.J.'s mother or it was recommended that he not contact her.[1] In spite of that, D.J.'s mother admitted that respondent stayed with her throughout the

[1] There was testimony of a "no-contact" order, whereas respondent claimed that it had simply been recommended that the two have no contact.

duration of the case. Moreover, respondent admitted that he lied about his address and his relationship with D.J.'s mother. Thus, there was evidence that the two continued their relationship in spite of ongoing domestic-violence issues. Finally, there was testimony that D.J.'s mother was sending respondent letters or postcards while he was incarcerated.

We conclude that the ground for termination contained in MCL 712A.19b(3)(c)(*i*) was established by clear and convincing evidence. There was evidence of ongoing issues with domestic violence that had not been sufficiently rectified and that were not likely to be rectified within a reasonable time, considering D.J.'s young age. Because of our decision, we need not address whether the other grounds were established by clear and convincing evidence. "Only one ground statutory ground for termination need be established." *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

III. BEST INTERESTS

Lastly, respondent argues that the trial court erred in its best-interests determination. We review the trial court's best-interests decision for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). Moreover, a child's placement with "a relative at the time of the termination hearing is an 'explicit factor to consider in determining whether termination was in the [child's] best interests.'" *Id*. at 43, quoting *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *In re Olive/Metts Minors*, 297 Mich App at 43.

The trial court made the following findings regarding best interests:

> Regarding the best interest of this child, he was nine months old when he came into care. Two years have passed. There's been no progress.
>
> It is in his best interest to terminate parental rights. Both of the foster care workers testified that it was. They testified about behavioral challenges he has as a result of parenting time. We have psychological that aren't good. And we have a failure to comply and benefit with services.
>
> So considering that he is entitled to stability and finality, considering his young age when he came into foster care and the likelihood that his bond is with his provider, the court finds it is in the best interest to terminate parental rights.

However, petitioner clearly stated that D.J. was in a relative placement. Accordingly, the trial court was required to make an explicit finding regarding whether termination was appropriate in light of D.J.'s placement with relatives. *Id*.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ /Michael J. Riordan